IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, *et al.*,
Petitioners,

v.

JAMES M. NAMEN, *et al.*, AND THE CITY OF POLSON, MONTANA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD ANTHONY BAENEN
Counsel for Petitioners
1735 New York Avenue, N.W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
R. ANTHONY ROGERS
FOSTER DEREITZES
ALAN I. RUBINSTEIN

VICTOR F. VALGENTI
212 First Federal Building
Missoula, Montana 59801
Of Counsel

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The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and Harold W. Mitchell, Jr., Chairman of the Tribal Council, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 534 F.2d 1376 (1976) and is reproduced as Appendix A. The opinion of the United States District Court for the District of

Montana is reported at 380 F.Supp. 452 (1974) and is reproduced as Appendix B. The partial summary judgment of the district court issued in connection with its opinion is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether reservation lands held in trust by the United States for an Indian tribe can be used by a non-Indian for wharves, docks, breakwaters, and other structures without the consent of the tribe or the Secretary of the Interior and without express congressional authorization.

TREATIES AND STATUTES INVOLVED

The following treaty and statutes are reproduced as appendices.

1. Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App. D).
2. General Allotment Act, Act of February 8, 1887, 24 Stat. 388 (App. E).
3. Act of April 23, 1904, 33 Stat. 302 (App. F).

STATEMENT OF THE CASE

In 1805, when Lewis and Clark came to what is now northwest Montana, they found the Salish, Kootenai, and Upper Pend d'Oreille Indians occupying a vast area of land. The Indians had lived there from time immemorial and they continued to do so until by the Treaty of Hell

Gate [1] they ceded to the United States all of their aboriginal homelands, save their present reservation. It is on the reservation, excepted from the cession by that Treaty,[2] that petitioners, descendants of those Indians, now live.[3]

In the Treaty it had been provided that the Indians would have exclusive use and occupancy of the reservation,[4] which included the south half of Flathead Lake. Congress, by the Act of April 23, 1904, 33 Stat. 302 (App. F), allotted portions of the reservation to tribal members, but title to the south half of the Lake, including the bed and banks, continued to be held in trust by the United States. *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (9th Cir. 1942).

One Antoine Morais was allotted lands within the reservation in 1908. This allotment was adjacent to the south half of the Lake. The Namen respondents are fee owners of portions of the former Morais allotment. Respondent James M. Namen operates a business on these lands and maintains buildings and structures which extend beyond the high water mark of the Lake and encroach on its bed and banks.[5] In the spring of 1973

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[1] Treaty of July 16, 1855, 12 Stat. 975 (App. D).

[2] The reservation was established pursuant to Article II of the Treaty. 12 Stat. at 975-976 (App. D at 34a-36a).

[3] Petitioner Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana ("the Tribes"), is a confederation of American Indian tribes organized pursuant to the provisions of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, with a governing body, the Tribal Council, duly recognized by the Secretary of the Interior. Petitioner Harold W. Mitchell, Jr., is an enrolled member of the Tribes, Chairman of the Tribal Council, and a resident of the reservation.

[4] Article II, 12 Stat. at 976 (App. D at 35a), declares: ". . . Nor shall any white man . . . be permitted to reside upon the . . . reservation without permission of the confederated tribes. . ."

[5] Among the structures which extend beyond the high water mark are wharves, piers, a storage shed, and a breakwater.

respondents commenced constructing a breakwater.[6] Representatives of the Tribes and the Bureau of Indian Affairs informed respondents that the breakwater under construction constituted a trespass on the Tribes' property and it and the other structures would have to be removed. Respondents refused and petitioners, on August 6, 1973, filed an action in the United States District Court for the District of Montana [7] seeking a declaration that respondents were in trespass upon tribal land, to the extent that their structures extended beyond the high water mark, and seeking to enjoin that trespass.[8]

The parties filed cross-motions for summary judgment. The City of Polson, located at the southern end of the Lake, within the reservation, intervened as a defendant.[9]

The district court granted defendants' motion and denied plaintiffs', holding:

(a) That title and ownership of the bed and banks of the south half of Flathead Lake are held by the United

[6] The breakwater extends for some distance into the Lake below the high water mark. The width of the breakwater, at water line, is approximately 16 feet. The breakwater is in the shape of the letter "L", enclosing a portion of the Lake and therefore the Tribes' reservation, to respondents' private use.

[7] Petitioners filed their complaint pursuant to 28 U.S.C. § 1362 and thereafter requested the United States, as their trustee, to intervene in the lawsuit. The United States did not intervene before the district court but did file a *amicus* brief with the Court of Appeals, supporting the position of the Tribes and urging reversal of the district court decision.

[8] ". . . The intent of the Tribes in this lawsuit is to establish ownership and by lease and regulations to ensure that the Tribes are compensated fairly for the use of their property and that the use of the Lake is in accordance with sound conservation and ecological considerations in furtherance of the interests of individuals residing on the Reservation. . . ." Opening brief of Confederated Tribes filed with Court of Appeals, note 92, p. 59.

[9] The City of Polson asserted it is successor in interest to various allotments riparian to the Lake.

States in trust for the Tribes and state law does not apply to determine if a riparian owner has any rights extending below the high water mark. (380 F.Supp. at 461; App. B at 17a).

(b) That riparian rights of access and wharfage to the south half of Flathead Lake could not be implied from the provisions of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App. D), or the Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657 (380 F.Supp. at 458-459; App. B 10a-13a).

(c) That the General Allotment Act [10] and other federal statutes which provided specifically for the allotment of lands within the Flathead Reservation [11] did not grant riparian rights of access and wharfage to owners of land riparian to the south half of Flathead Lake (380 F.Supp. at 459-461; App. B 13a-17a).

Petitioners concurred with the above, but the trial court went on to hold:

(d) That federal common law principles governing riparian rights establish that Congress, although it did not so express itself, intended that when tribal lands adjacent to Flathead Lake were allotted the tribal member, in addition to his allotment, would receive riparian rights in the unallotted tribal estate, which rights attached to the allotted land and survived cessation of Indian ownership (380 F.Supp. at 461-466; App. B 17a-29a).

(e) That the Namens, successors in interest to the allotment, are entitled as a matter of law not only to access to the Lake [12] but also to maintain structures be-

[10] Act of February 8, 1887, 24 Stat. 388 (App. E).

[11] Act of April 23, 1904, 33 Stat. 302 (App. F).

[12] Access to the former Morais allotment is by U.S. Highway 93, which fronts it.

low the high water mark of the Lake, without the consent of the Tribes or their trustee, the United States.

On appeal, a panel of the Court of Appeals for the Ninth Circuit adopted *per curiam* the opinion of the district court (534 F.2d at 1377; App. A 1a-3a). Consequently, it is, in effect, the opinion (380 F.2d at 452; App. B) and the partial summary judgment (App. C) of the district court for which review is sought.

REASONS FOR GRANTING THE WRIT

The decisions of this Court relating to Indian property have been characterized from the beginning by clear and consistent holdings absolutely protecting the dwindling land base of tribes, save where there has been clear congressional action removing the lands in question from Indain ownership. The integrity of this rule has now been challenged by the court below. To the best of our knowledge, for the first time in the history of the United States, the decision below allows an adjoining non-Indian owner to encumber the title of, and actually physically occupy, federally owned trust lands. The court below achieved this unprecedented result without finding the clear congressional authority required by this Court in other cases. Rather, the court below found applicable by mere implication a common law rule of wharfage never before applied to Indian reservations, so as to remove from the Tribes the right to occupy and regulate their property. Further, to obtain this result, the court interpreted treaties, statutes, and documents against the Indians, in violation of the well-settled rules of this Court that treaties and statutes must be construed in favor of Indian tribes.

The decision, therefore, constitutes a significant precedent which, if uncorrected by this Court, will stand for the granting away of tribal trust property and the impairment of Indian treaty rights by implication, rather

than express congressional authorization, and will impair significantly the property and treaty rights of numerous Indian tribes [13] and the responsibilities of the United States as trustee of those property and treaty rights.[14]

I.

In *Worchester* v. *Georgia*, 31 U.S. 515, 582 (1832), the rule of construction for treaties involving Indians was established:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered or used only in the latter sense."

This principle, applicable also to statutes,[15] has been followed faithfully to the present, most recently in *Bryan* v. *Itasca County*, —— U.S. ——, 96 S.Ct. 2102 (1976).

The court below, however, violated this "eminently sound and vital canon" [16] and construed the federal statutes involved as granting by implication to some

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[13] In 1974 the United States held 40,772,000 acres of tribal land in trust for various Indian tribes and 10,243,000 acres of allotted land in trust for individuals, *Statistical Abstract of the United States*, 1975, U.S. Department of Commerce, table #342, p. 207.

[14] The interest of the United States, as trustee of the land and property rights involved in this case, was expressed in its *amicus* brief filed with the court of appeals. "This case raises an important question with respect to Indian affairs, which may affect other Indian controversies which may recur in this and other areas of the United States."

[15] ". . . [S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918), cited in *Bryan* v. *Itasca County*, —— U.S. ——, 96 S.Ct. 2102, 2113 (1976).

[16] *Northern Cheyenne Tribe* v. *Hollowbreast*, —— U.S. ——, 96 S.Ct. 1793, 1797 (1976).

allottees, but not to all, interests in tribal lands that could be exercised to the detriment of the treaty rights of all other tribal members, whether allotted or not.[17] The court, while reciting the unchallenged rules of construction, contradicted them because, in the court's words, "To grant the relief in light of the factual and legal consideration . . . would be a grevious injustice to the defendants and others in a similar position." [18]

The decision of the court, unfortunately, does more than an injustice to your Indian petitioners, based on the court's perception of an "injustice" to non-Indians. There are, within the jurisdiction of the district court below, seven Indian reservations,[19] and 1,947,000 acres of land held in trust by the United States for the tribes of those reservations, and 3,210,000 acres held in trust for individual Indians,[20] while within the overall jurisdiction of the Ninth Circuit, there are 153 Indian reservations [21] and 26,084,000 acres of tribal trust land and

[17] There is a sharp distinction between tribal property which is held in common and property held by an allottee. *Northern Cheyenne Tribe* v. *Hollowbreast, supra; Gritts* v. *Fisher*, 224 U.S. 640 (1912); *Whitefoot* v. *United States*, 155 Ct. Cl. 127 (1961); *St. Marie* v. *United States*, 108 F.2d 876 (9th Cir. 1940). As long as land remains tribal in character, an individual Indian has no vested rights, as against the tribe, to any specific part of the tribal property. *Northern Cheyenne Tribe* v. *Hollowbreast, supra.* Tribal property is controlled by the tribe and is used for the benefit of all.

Allotment of reservation lands has been prohibited since the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

[18] 380 F.Supp. at 466 (App. B at 28a-29a), recited by the Court of Appeals in its *per curiam* affirmance 534 F.2d at 1377 (App. A at 3a).

[19] Information compiled from *Federal and State Indian Reservations and Indian Trust Areas*, U.S. Department of Commerce, GPO 1974.

[20] *Statistical Abstract of the United States*, 1975, U.S. Department of Commerce, Table #342, p. 207.

[21] See footnote 19, *supra.*

4,671,000 acres of individual trust land.[22]

For the other two circuits that cover the rest of the major Indian holdings, the Eighth and the Tenth, there is a total of 90 reservations [23] with 14,448,000 acres of tribal trust land, and 7,481,000 acres of individual trust land.[24] Therefore, any decision of the Ninth Circuit on the statutory construction of acts of Congress affecting allotments and tribal lands and treaty rights is of extreme significance and the deviant standard adopted by the court below, where the construction of a statute is based on a balancing of "equities" between Indians and non-Indians, cannot be permitted to stand.

II.

The Morais allotment was granted pursuant to Section 2 of the Act of April 23, 1904, which opened the Reservation to non-Indian settlement. Section 2 provided:

> "That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights . . . under the provisions of the allotments laws of the United States." (33 Stat. 302 at 303; App. E at 50a).

The "allotment laws of the United States" referred to in Section 2 of the 1904 Act was the General Allotment Act,[25] which provided for the allotment of tribal lands "advantageous for agricultural and grazing purposes." Other portions of tribal land were to be sold. Section 16 of the 1904 Act stated that the United States was

[22] See footnote 20, *supra.*

[23] See footnote 19, *supra.*

[24] See footnote 20, *supra.*

[25] Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 331, *et seq.* (App. F).

rights in other tribal property that could be exercised to frustrate guaranteed treaty fishing rights.[27]

It was against this background that the court below found by implication that Congress intended allotments adjacent to Flathead Lake to carry with them federal common law riparian rights in the adjacent tribal land.

In reaching this conclusion, the court below violated the one cardinal rule of construction adopted by this Court in Indian cases—that treaties and statutes must be interpreted in favor of the Indians.

Allotment acts diminish the tribal estate and should be construed narrowly. The court below, however, construed the statute against the Tribes, by holding that the Morais allotment, by implication, carried with it riparian rights, and thus diminished the tribal estate further, contrary to the rule that statutes "passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States, supra,* at 89. *Cf. Northern Cheyenne Tribe* v. *Hollowbreast, supra.*

The court also violated the canon that statutes "must be construed not according to their technical meaning but 'in the sense in which they would naturally be understood by the Indians' ",[26] for certainly the Indians were unaware of the common law doctrine of riparian rights and certainly none of them can be presumed to have understood that a statute allotting Antoine Morais and some other individual members only certain rights in tribal property, also granted those members additional

[26] *Carpenter* v. *Shaw,* 280 U.S. at 367, quoting from *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899).

rights in other tribal property that could be exercised to frustrate guaranteed treaty fishing rights.[27]

III.

The opinion of the court below is an exceedingly more dangerous precedent to Indian land holdings and treaty rights than may appear at first blush because the court determined the scope of the Morais allotment not by construing the 1904 Act that granted that allotment, but by relying on Acts subsequent thereto that affected neither the allotment nor trust provisions of the 1904 Act.[28]

The court did this to avoid what it saw as a "grievous injustice" to the non-Indians who inhabit the reservation and own former allotments or "villa sites." Simply stated, had the court below followed the rules of construction laid down by this Court, the decision would have been to the contrary. Those rules, however, gave way here before non-Indian interests.[29]

[27] In *United States* v. *Winans,* 198 U.S. 371 (1905), non-Indians received fee patents absolute for land riparian to the Columbia River, away from the Indian reservation, but embracing traditional Indian fishing spots. The non-Indians were precluded from excluding the Indians from the land, by virtue of the Indians' treaty fishing rights. Here a non-Indian, successor to an allottee, is permitted to exclude the Indians not only from his land but from the Indians' own land.

[28] The court relied in the main on the Act of April 12, 1910, 36 Stat. 296, relating to "villa sites" which are not riparian to the Lake and which were not before the court. 380 F.Supp. at 466 (App. B at 28a). In relying on subsequent acts to determine the intent of Congress in 1904, the court below violated another established canon of construction, that the meaning of an enactment affecting Indian lands may not be altered by a subsequent declared intention of Congress, *Choate* v. *Trapp,* 224 U.S. 665, 667 (1912).

[29] It is obvious from the statement of the trial court, repeated by the appellate court, that the construction was neither for the benefit of the Tribes nor of the allottee—but for his non-Indian successor. The construction given was not necessary from an allottee's point of view, since as a tribal member he could use tribal lands and waters, subject to tribal control.

The court, in basing its construction of the 1904 Act on a balancing of the "equities" (the expenditure of funds over a period of years by non-Indians in the development of their riparian lands against a failure of the Tribes or their trustee to assert tribal title), accepted as the basis for its decision arguments rejected as early as *United States* v. *Winans*, 198 U.S. 371 (1905), and *Winters* v. *United States*, 207 U.S. 564 (1908), and as recently as *Cappaert* v. *United States*, —— U.S. ——, 96 S.Ct. 2062 (1976). Construction of Indian statutes and treaties, however, does not involve a balancing of equities. As this Court said most recently in connection with rights akin to those held by the Tribes:

> "Nevada argues that the cases establishing the doctrine of federal reserved water rights articulate an equitable doctrine called for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters* v. *United States*, *supra*, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The 'Statement of the Case' in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.'"—*Cappaert* v. *United States*, —— U.S. ——, 96 S.Ct. at 2070.

"[4] Nevada is asking, in effect, that the Court overrule *Arizona* v. *California*, 373 U.S. 546 . . . (1963) and *United States* v. *District Court for the County of Eagle*, 401 U.S. 520 . . . (1971), to the extent that they hold that the implied reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the 'competing equities.' Nevada's Brief, at 15. However, since balancing the equities is not the test, those cases need not be disturbed."

It is precisely so here, where the rights reserved by the Tribes and guaranteed by the United States were within the defined confines of the reservation. To allow the lower court's rule of construction to remain the law will subject long-established Indian land holdings and treaty rights to judicial diminishment, based on a court's feelings concerning modern-day equities.[30] This is a dangerous, unacceptable precedent not only with regard to Indian land holdings and treaty rights, but also with regard to the interests of the United States. *Cf. Cappaert* v. *United States*, *supra*.

IV.

The opinion of the court below conflicts directly with the decision of this Court in *United States* v. *Winans*, 198 U.S. 371 (1905). In *Winans*, the Yakima Indians, by their treaty of cession,[31] "secured" to themselves in land ceded, the right to take fish in all of their usual and accustomed places, in common with the citizens of the territory. Some of these "usual and accustomed" places were on the banks of the Columbia River. Patents absolute in form were issued to non-Indians for the land

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[30] The district court, in holding against the Tribes, in effect accuses them and the federal government of standing by, for half a century, with full knowledge of and without objection to the development by riparian owners of the south half of Flathead Lake (380 F.Supp. at 466; App. B at 28a-29a). The federal government, of course, does not have to bring a lawsuit on behalf of an Indian tribe unless it wishes to do so. *Pyramid Lake Paiute Tribe* v. *Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962. *Siniscal* v. *United States*, 208 F.2d 406 (9th Cir. 1953), *cert. denied*, 348 U.S. 818 (1954); see *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968). Indian tribes lacked the authority to sue unless they could prove the amount in controversy exceeded $10,000, until the Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362. See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974). The observations and feelings of the courts below are important only as a guide to why they deviated from the canons of construction established by this Court.

[31] Treaty of June 9, 1855, 12 Stat. 951. This treaty is in most material respects identical to the Treaty of Hell Gate.

riparian to the river, at the fishing locations. The patentees then precluded the Indians from the lands.

In directing the patentees to accommodate the Indians in the exercise of their treaty fishing rights, this Court held:

> "the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusions would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees." (198 U.S. at 381-382).

Article III of the Treaty of Hell Gate provides:

> "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right to taking fish at all usual and accustomed places, in common with citizens of the Territory. . ."[32]

Nothing in any of the Acts of Congress relating to the Flathead Reservation indicates an abrobation of the petitioner Tribes' fishing rights, and if there is to be an abrogation, it must be express. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). *See Antoine* v. *Washington*, 420 U.S. 194 (1975).

It has been said about the Indians of the Flathead Reservation and their treaty fishing rights:

> "The Indian society is communal in character rather than individualistic; and this is particularly true in respect of the hunting and fishing grounds of the Indians. The right of the Flathead tribes to take fish in the waters within or bordering on the Reservation is carefully defined and safeguarded in

[32] 12 Stat. at 976; App. D at 36a. This language is almost identical to the treaty language considered in *United States* v. *Winans*, *supra*.

> Article III of the treaty." *Montana Power Co.* v. *Rochester*, *supra*, at 192-193.

Riparian rights are property rights, *Ketchican Spruce Mills* v. *Alaska Concrete Prod. Co.*, 113 F.Supp. 700 (D. Alas. 1953), and the holder of those rights can exercise them to exclude others from the bed, banks, and waters involved, *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926). This is precisely what respondents are doing now, with the concurrence of the court below. A non-Indian, owning a portion of a former allotment, is permitted to exclude the Indians not only from his land, but from the Indians' own land. This controverts the holding in *Winters* v. *United States*, *supra*.[33]

The decision below denies petitioners authority to control the use of their treaty lands, in effect making them as to these lands nothing more than "private, voluntary organizations," a characterization of tribes that was rejected by this Court in *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975), and contradicts the principal of tribal self-government, reaffirmed most recently in *Bryan* v. *Itasca County*, *supra*. The lower court found no express decision by Congress with respect to the Tribes' right to control their own land,[34] yet "federal common law" of riparian rights, never before held to prevail on Indian trust lands, was found to control, superseding not only tribal law and tribal ownership rights but also the federal government's duty to fulfill its trustee obligations. This is in stark contradiction to the federal government's exercises of plenary powers over Indian lands and affairs. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. at 171-173.

[33] Petitioners cannot fish where sheds and wharves or docks are located, nor where a breakwater is maintained. (See note 6, *supra*). In fact, the breakwater encloses a portion of the trust reservation lands to respondents' private use.

[34] 380 F.Supp. at 460-461, App. B 16a-17a.

Rejected was the Tribes' position that its authority over the bed of the Lake within the reservation was on the same ground as that of the several states over the beds of navigable waters within their boundaries.[35] The court distinguished that situation, saying that unlike state lands, tribal lands were held in trust. The distinction ignores well-established law that the interest of the United States is a naked title alone, with full rights of possession, use and control residing in the tribes. The tribal right is "as sacred as that of the United States to the fee." *United States* v. *Cook*, 19 Wall. 591, 593 (1873), quoted in *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497-498 (1937).[36]

The court's distinction further ignores the sovereign aspect of Indian tribes, *Bryan* v. *Itasca County, supra; Moe* v. *Confederated Salish and Kootenai Tribes*, —— U.S. ——, 96 S.Ct. 1634 (1976); *McClanahan* v. *Arizona State Tax Commission, supra*, and their power to govern even non-Indians on fee land within a reservation with respect to certain uses of that land. *United States* v. *Mazurie, supra.*

The distinction, finally, rests on the erroneous assumption that while Congress may take and control Indian trust land, it may not take and control state-owned land. It is well-established, however, that the federal power of eminent domain extends to state land and property, as it does to any other. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941); *Yalobusha County* v. *Crawford*, 165 F.2d 867, 868 (5th Cir. 1947); *Minnesota* v. *United States*, 125 F.2d 636, 639

[35] 380 F.Supp. at 464; App. B 23a-24a.

[36] "Although the United States retained the fee, and the Tribe's right of occupancy was incapable of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple title absolute. *Cherokee Nation* v. *Georgia*, [30 U.S. 1] 5 Pet. 1, 48. *Worchester* v. *Georgia, supra* [31 U.S. 515], 580," quoted in *United States* v. *Shoshone Tribes*, 304 U.S. 111, 117 (1938).

(8th Cir. 1942). The trust status of Indian land subjects it to no greater infirmity from federal taking action than state land.

It is clear that the Tribes have always had regulatory authority over the bed of the south half of Flathead Lake and that Congress has never abrogated that authority by extending to allotments, adjacent to the Lake, federal common law riparian rights, heretofore applicable only in the inapposite locales within the District of Columbia and the federal territories,[37] and never, before this decision below, within an Indian reservation.

[37] *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884), and *Ketchikan Spruce Mills* v. *Alaska Concrete Prod. Co.*, 113 F.Supp. 700, 701-702 (D. Alaska 1953). In *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926), this Court applied the federal common law rule only where the riparian proprietor also owned the *bank*, which respondents here do not.

CONCLUSION

For the above reasons a writ of *certiorari* should issue to review the decision of the Court of Appeals.

Respectfully submitted,

RICHARD ANTHONY BAENEN
Counsel for Petitioners
1735 New York Avenue, N.W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
R. ANTHONY ROGERS
FOSTER DEREITZES
ALAN I. RUBINSTEIN

VICTOR F. VALGENTI
212 First Federal Building
Missoula, Montana 59801
Of Counsel

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-1106

THE CONFEDERATED SALISH AND KOOTENAI TRIBES, et al.,
Plaintiffs-Appellants,

vs.

JAMES M. NAMEN, et al., and CITY OF POLSON,
a Montana Municipal Corporation, Intervenor,
Defendants-Appellees.

OPINION

[May 12, 1976]

Appeal from the United States District Court for the District of Montana

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Before: BARNES, SNEED and KENNEDY, Circuit Judges.

PER CURIAM:

Defendant-appellee Namen owns property bordering upon Flathead Lake, within the boundaries of the Flathead Indian Reservation in Montana. Namen is the successor in interest to an Indian allottee who, pursuant to the Indian Allotment Act of 1904 (33 Stat. 302) and amendments thereto, obtained from the United States a patent in fee covering the lakeside property in question.

In connection with this business, Namen has constructed piers, wharves, and other structures related to navigation, which extend over the bed and bank of Flathead Lake.

The City of Polson, Montana was permitted to intervene as a defendant. The city also owns lakeside property within the Reservation, from which public docks have been constructed for recreational use.

The Confederated Salish and Kootenai Tribes brought suit in the District Court, seeking a declaratory judgment that Namen's waterfront structures were in trespass upon Indian property, and seeking injunctive relief prohibiting future trespass and requiring demolition of existing structures. The bases for the requested relief were that, allegedly, (1) the Tribes, as beneficial owners of the lake bed, have the exclusive right to control its use; (2) allotments of lakeside property were never meant to convey riparian rights; and (3) no such rights exist at present because they are not recognized in the (allegedly controlling) tribal law.

In a carefully reasoned opinion, the District Court (Judge Jameson, presiding) granted partial summary judgment in favor of defendants, recognizing the existence of their riparian rights of wharfage and access to navigable waters, but reserving judgment on the question whether existing structures abused those rights. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont. 1974).

The Tribes appeal from the adverse summary judgment. This Court's jurisdiction is predicated upon 28 U.S.C. § 1292(a)(1), which allows appeals from interlocutory orders denying injunctive relief. We affirm.

The District Court concluded as a matter of law that allotments of land adjacent to the lake carried title only as far as the high-water mark of the lake, and that the United States, as trustee for the Tribes, holds title to the

banks and bed of the lake. The District Court further concluded that since title to the lake bed is held by the United States, federal common law, and not state or tribal law, governs the existence of any riparian rights associated with Namen's property. Control of the lake bed was thus found to be analogous to federal trust ownership of navigable waters in territories prior to statehood.

The District Court found that riparian rights were not expressly created by either the treaty which created the Flathead Reservation (Treaty of Hellgate, 12 Stat. 975) or the statutes under which allotments of Flathead Reservation property were granted. Nevertheless, drawing support from principles of federal common law (wherein riparian rights have traditionally been recognized; *see Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672, 683 (1884)) and from the long history of navigation on Flathead Lake, the District Court concluded that Congress must have intended that grants of riparian lands under the Indian Allotment Acts should carry rights of access and wharfage. The District Court further concluded that to grant the relief requested by plaintiffs "would be a grievous injustice to the defendants and others in a similar position." 380 F. Supp. at 466. Accordingly, partial summary judgment was granted in favor of defendants.

After a careful review of the arguments made on appeal, we have concluded that the District Court's reasoning was correct. We therefore adopt Judge Jameson's opinion below as the opinion of this court.

AFFIRMED.

APPENDIX B

THE CONFEDERATED SALISH AND KOOTENAI TRIBES, et al.,
Plaintiffs,

v.

JAMES M. NAMEN, et al., and City of Polson,
a Montana municipal corporation, Intervenor,
Defendants.

Civ. No. 2343

United States District Court, D. Montana,
Missoula Division

Aug. 14, 1974

Richard A. Baenen of Wilkinson, Cragun & Barker, Washington, D.C., and Victor F. Valgenti, Missoula, Mont., for plaintiffs.

Poore, McKenzie, Roth, Robischon & Robinson, Butte, Mont., for defendants.

Christian, McCurdy, Ingraham & Wold, Polson, Mont., for intervenor City of Polson.

Boone, Karlberg & Haddon, Missoula, Mont., for the Flathead Lakers, Inc.

JAMESON, District Judge.

The plaintiffs, The Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) and Harold W. Mitchell, Jr., chairman of the Tribal Council, instituted this action for declaratory and injunctive relief against the defendants, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen, the owners of land located in Polson, Montana on the south half of

Flathead Lake, which is a part of the Flathead Indian Reservation. Plaintiffs seek a judgment declaring that "the defendants are in trespass upon plaintiffs' land to the extent that they maintain and have erected buildings and structures beyond the high water mark * * * of Flathead Lake and encroach on the bed and banks of said Lake".[1] They ask the court to enjoin all further trespass and that "defendants be directed to immediately remove all buildings and structures, including landfills, that extend beyond" the high water mark and that the lands below the high water mark "be restored to their original condition".

Defendants filed a motion to dismiss for failure to state a claim. Plaintiffs filed a motion for summary judgment. The City of Polson was permitted to intervene and filed an answer.[2] Flathead Lakers, Inc. was granted leave to file a brief as amicus curiae.[3]

At a hearing on March 22, 1974 the parties agreed upon most of the facts essential to a determination of the pending motions and were granted time for further dis-

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[1] The complaint alleged a high water mark "elevation of 2893.2 feet". The parties were unable to agree upon the elevation. At a hearing on March 22, 1974 plaintiffs agreed that for the purpose of this action any reference to a stated elevation "should be considered altered to merely state at the highwater mark at whatever it may be".

[2] The motion to intervene recited, *inter alia*, that the City of Polson owns land fronting the south half of Flathead Lake, on which it has developed a recreational area, with public docks used for swimming and boating; that the dock is located on land between high and low water marks of the Lake; that the City has levied taxes against the dock, boat house and wharf facilities of the defendants.

[3] An affidavit in support of the petition to file brief recited that The Flathead Lakers, Inc., is a non-profit corporation having in excess of 2,000 members, with a very substantial part of the members owning real property fronting on the shores of the south half of Flathead Lake.

covery and supplemental briefs. The court suggested that the motion of the defendants to dismiss be considered a motion for summary judgment. The defendants and intervenor[4] have now agreed that their motions to dismiss may be considered as motions for summary judgment pursuant to the provisions of Rules 12(b) and 56 of the Federal Rules of Civil Procedure.

All parties have conducted extensive discovery and have filed comprehensive and well considered briefs. The court is satisfied that there is no genuine issue as to any material fact with respect to the primary issue of whether the defendants as owners of property riparian to the south half of Flathead Lake have the riparian rights of access and wharfage.

Statement of Facts

The following facts are not disputed by any of the parties:

(1) The plaintiff Tribes are a confederation of American Indian Tribes organized pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., with a governing body recognized by the Secretary of the Interior. The plaintiff Mitchell is an enrolled member of the Tribes and is chairman of the Tribal Council.

(2) The Flathead Reservation was created pursuant to the Treaty of Hellgate, July 16, 1855, 12 Stat. 975, reserving for the plaintiff Tribes the land embraced by the following boundaries:

> "Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's

[4] The answer of the City of Polson included a motion to dismiss for failure to state a claim.

> Fork between the Camash and Horse prairies; thence northerly to, and *along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremeties of the Flathead Lake*; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, thence southerly along said divide to the place of beginning." (Emphasis added).

(3) In 1908 the United States, pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, allotted to Antoine Morias (Indian Allotment No. 1378) the following lands within the Reservation:

> "The Lot one, the east half of the Lot two, and the southeast quarter of the southeast quarter of section three in Township twenty-two north of Range twenty west of the Montana Meridian, Montana, containing seventy-five and forty-two-hundredths acres."

These lands are riparian to the south half of Flathead Lake, which is a navigable body of water. The south half of Flathead Lake was included in the lands reserved to the Tribes by the Treaty of Hellgate.

(4) The defendants, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen are the owners in common through successive conveyances of portions of the Morias allotment described as the east half of Lot 2, Section 3, Township 22 North, Range 20 West, Montana Principal Meridian.

(5) The defendant James M. Namen operates a business known as Jim's Marina, Polson, Montana on these riparian lands, and "as proprietor of Jim's Marina has erected and maintained certain buildings and structures which extend beyond the high-water mark of the lake and encroach on the bed and banks of Flathead Lake".

Among the structures which extend beyond the high water mark are: (a) docks, wharves and piers; (b) a breakwater built in 1973; and (c) a storage shed.

(6) The breakwater extends for some distance into the lake below high water mark. "The width of the breakwater, from water line to water line is approximately 16 feet, and the sides of the breakwater descend at an angle so that the width of the breakwater along the bed of the lake is in excess of 16 feet."

(7) The marina and assorted structures that encroach on the bed and banks of the lake below high water mark are utilized for business or commerce in connection with Flathead Lake.

(8) During the period from around the turn of the century into at least the 1920's, Flathead Lake was used at various times and on various occasions for commerce; * * * boats and related water vehicles traveled the lake from one end to the other."

(9) Wild Horse and Cromwell Islands lie within the south half of Flathead Lake. All lands on Wild Horse Island were conveyed under the allotment act of 1904 (33 Stat. 302) as amended.

For the purpose of considering the pending motions the court also concludes as a matter of law:

(1) The land within the original boundaries of the reservation, including the land owned by the defendants and the south half of Flathead Lake, is still part of the Flathead Reservation.[5]

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[5] It is clear from Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 137 L.Ed.2d 92 (1973) and 18 U.S.C. 1151, that all lands embraced within the original boundaries of the Flathead Reservation are still part of that Reservation, even though parts of the reservation were opened to settlement by non-Indians under various land acts. The "reservation is located in four counties of the state, Missoula, Lake, Sanders and Flathead, and consists of approximately 1,250,000 acres of which 615,418 acres is trust land. The total resident membership of the tribe is 19 percent of the total population living within the exterior boundaries of the reservation." Security State Bank v. Pierre, 511 P.2d 325, 326 (Mon. 1973).

(2) The allotment of Antoine Morias conveyed title only to the high water mark at Flathead Lake, and the high water mark is the boundary of the defendants' property.[6]

(3) Since the time of the Treaty of Hellgate, the United States has held and still holds the bed and banks of Flathead Lake below high water in trust for the plaintiff Tribes.[7]

Contentions of Parties

Defendants and intervener claim a right of access to Flathead Lake, together with the concomitant right to construct and maintain "dock, wharf and pier facilities" on the bed and banks of the south half of Flathead Lake below high water mark. They contend that the estate reserved to the Tribes in the south half of Flathead Lake by the Treaty of Hellgate is not absolute. Rather, they contend, (1) the riparian rights of wharfage may be

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[6] As was stated in Montana Power Co. v. Rochester, 127 F.2d 189, 192 (9 Cir. 1942), a case involving a boundary dispute on Flathead Lake: "The general rule, of course, is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark".

[7] As the court said in *Rochester*, *supra* at 191, "Whether the ownership was originally in the Indians or in the United States, it is certain that by the treaty the United States undertook to hold title to the reserved area, including the bed of the southerly half of the lake, in trust for the confederated tribes." The defendants admit for the purpose of their own motion that the United States holds title to the bed and banks of Flathead Lake below the high water mark in trust for the Tribes. Questioning the rationale of *Rochester*, defendants refuse to make this admission for the purpose of plaintiffs' motion. This court holds, as it did in United States v. Pollmann, 364 F.Supp. 995, 999 (D.Mont. 1973), that *Rochester* is controlling.

implied from provisions of the Hellgate Treaty and the Treaty of the Upper Missouri; (2) the estate reserved to the Tribes has been limited by allotment and settlement statutes which manifested a Congressional intent "to grant riparian rights which accompany lakeshore property"; and (3) the owners of lands riparian to Flathead Lake acquired under the allotment and settlement statutes are entitled to the riparian rights of access and wharfage under federal common law doctrine.

Plaintiffs contend that as the beneficial owners of the bed and banks of the lake below high water mark, they have the right to control the use of that land. They argue that no rights below the high water mark were ever extended to the owners of riparian lands by either treaty or statute. Finally, they contend that federal common law principles of riparian rights are not applicable, but rather that tribal law is controlling and the Tribes have never granted riparian rights to owners of lakeshore property.

Hellgate Treaty and Treaty of Upper Missouri

Defendants contend that the riparian right of wharfage may be implied from certain provisions in the Hellgate Treaty and the Treaty of the Upper Missouri. The court cannot agree.

Article III of the Hellgate Treaty provides in part:

> "That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with *free access* from the same to the nearest public highway is secured to *them*; as also the right in common with citizens of the United States to travel upon all public highways." (Emphasis added).

It is true, as defendants point out, that under 43 U.S.C. § 931 navigable rivers are "deemed public highways" and under 22 U.S.C. § 10 the navigable rivers and waters within the Louisiana Purchase are "public highways". However, when Article III refers to securing free access to the public highway "to them", it is not clear whether the word "them" refers to the public in general or to members of the Tribe. After providing for roads for the public convenience, the article continues with the phrase "on the other hand". The language following may reasonably be construed as referring to members of the Tribe. Doubtful expressions must be resolved in favor of the Indians. Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1974). The provision for right of free access to public highways must therefore be found to be for the benefit of members of the Tribes.

Even if "them" were interpreted to mean the general public, it would be improper to construe the term "public highway" in the Treaty as including the south half of Flathead Lake. As stated in Carpenter v. Shaw, *supra*,

> " 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' Worcester v. The State of Georgia, 6 Pet. 515, 582 [31 U.S. 515, 8 L.Ed. 483] . . . And they must be construed, not according to their technical meaning, but in the sense in which they would naturally be understood by the Indians.' Jones v. Meehan, 175 U.S. 1, 11 [20 S.Ct. 1, 44 L.Ed. 49]." *Id.*

The court agrees with the plaintiffs that to construe public highway to include the southern half of Flathead Lake

"requires a finding that the unlettered Indians in 1855 understood 'road' to mean 'water' and that one of the 'roads' that *might* be run through their Reservation was already there and was 180 square miles large". Such an interpretation is clearly forbidden by *Shaw* and numerous subsequent decisions.

The Treaty of the Upper Missouri, 11 Stat. 657, was entered into on October 17, 1855 (three months subsequent to the Hellgate Treaty) between the United States and a number of tribes, including the Flathead, Upper Pend d'Oreilles and Kootenai.[8]

Article VIII of the Treaty provides:

> "For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description . . . *and that the navigation of all lakes and streams shall be forever free to citizens of the United States.*" (Emphasis added).

Defendants contend that this provision, especially the last clause, supports their claim to the riparian right of wharfage. This provision, however, is nothing more than a recognition of the public's right of navigation. The public's right of navigation and the riparian owners' wharfage rights are separate and distinct rights. The latter do not automatically derive or result

[8] While the Flatheads and Nez Perce tribes were parties to this treaty, it was concerned primarily with the establishment of the Blackfeet Reservation, "the definition of [its] boundaries, the prevention of disputes among the tribes, and the establishment of peace". Colliflower v. Garland, 342 F.2d 369, 371 (9 Cir. 1965). See also Blackfeet and Gros Ventre Tribes, 127 Ct.Cl. 807, 809, 119 F.Supp. 161, 162 (1954), cert. denied, 348 U.S. 835, 75 S.Ct. 58, 99 L.Ed. 658 (1914).

from the former. The right of wharfage is a private right which is not everywhere recognized, whereas the right of navigation is a public right which all jurisdictions respect and which is superior to the right of wharfage. See Yates v. Milwaukee, 77 U.S. 497, 19 L. Ed. 984 (1871); 1 Wiel, Water Rights in the Western States, Section 904, p. 942 (3rd ed. 1911); 1 Clark, Waters and Water Rights, Section 37.2(c) pp. 209-210 (1967). The court agrees with plaintiffs that the Treaty of the Upper Missouri "does not speak to riparian rights below high water mark of any navigable lake or stream", and although it "might be applicable to a boating case involving Flathead Lake, here * * * it is irrelevant".

Effect of Allotment Acts and Other Congressional Enactments

Defendants next argue that, under the General Allotment Act of 1887 and the 1904 Allotment Act and its numerous amendments, it is evident "that Congress intended those owners fronting on the lake to own and possess all water rights in and to Flathead Lake which a normal riparian owner would possess", and that these riparian rights include the right to erect boating and wharf facilities. In determining the effect of the Congressional Acts it is recognized that while the power to abrogate treaty rights exist, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress". Pigeon River Co. v. Cox Co., 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934), quoted in Menominee Tribe v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). On the other hand, although statutes terminating or limiting treaty rights "should be construed narrowly", the courts "cannot ignore the intention of Congress where it is perfectly plain". United States v. Seaton, 101 U.S. App.D.C. 234, 248 F.2d 154, 155 (1957).

With the enactment of the General Allotment Act of 1887 (24 Stat. 388) the Federal Government commenced a general policy of alloting tribal lands within the various reservations to individual Indians. Generally, this system provided for the grant of a specified number of acres, with the grant held in trust for a period of 25 years, after which the allottee was issued a patent in fee. The Act authorized the Secretary of the Interior to prescribe rules and regulations deemed necessary to secure a joint and equal distribution of waters for irrigation, whether or not the lands were riparian. See United States v. Power, 305 U.S. 527, 533, 59 S.Ct. 344, 83 L.Ed. 330 (1939).

The allotment system was specifically applied to the Flathead Reservation by the Act of April 23, 1904, 33 Stat. 302, which provided for the survey and allotment of the lands within the Reservation and the sale and disposal of surplus lands remaining after allotment. Following allotment, a commission was appointed by the President to inspect, appraise and value unallotted lands and to classify the lands as agricultural, timber, mineral or grazing lands. The unallotted lands were then open to settlement and entry by Presidential proclamation and disposed of "under the homestead, mineral, and town-site laws of the United States" which speak of "rights to the use of water for mining, agricultural, manufacturing, or other purposes". 30 U.S.C. § 51.

The Allotment Act of 1904 was subsequently amended on a number of occasions to further implement the policy of allotment and settlement on the Flathead Reservation.[9] The Act of June 21, 1906, 34 Stat. 325, 354 provided for the surveying and platting of town-sites at various settlements within the Reservation, and added Section 19 to the 1904 Act to provide that nothing in the Act should be construed to deprive "any of said Indians, or said persons or corporations to whom the use of land is granted by the Act" of water appropriated and used for irrigation and domestic purposes.

[9] The Act was amended in 1905, 33 Stat. 1048, 1081 to provide for a grant to the State of Montana for the use of the University of Montana for biological station purposes. That station is located on the banks of the south half of Flathead Lake.

By the Act of May 29, 1908, 35 Stat. 444, Congress provided that alloted lands "which can be sold under existing law * * * may be sold on the petition of the allottee", and "That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold * * *."

In the Villa Sites Act of 1910, 36 Stat. 296-297, Section 23 was added to the 1904 Act, providing for the survey and subdivision into two to five acre lots of "all of the unallotted lands fronting on Flathead Lake * * * that are embraced within the limits of the Flathead Indian Reservation" and for sale thereof "to the highest bidder at public sale". An advertising circular issued by the Department of the Interior in connection with the sale of the Villa Sites stated that "The lake is utilized for bathing, sailing, boating, and yachting, and several steamboats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves." This circular also recited that "Trains from Kalispell, on the Great Northern Railway, connected Somers for the morning trips of the steamers over the lake to Polson, and from Somers to Big Arm by way of Dayton, Elmo, and many other wharf landings on the western shore." [10]

[10] The Report of the Committee on Indian Affairs on Senate Bill 3983, the Villa Sites Act, submitted by Senator Dixon of Montana, reads in pertinent part:

> "The Flathead Indian Reservation has been surveyed and allotments made to all of the Indians holding tribal relations

The Act of 1904 was amended in 1911 (36 Stat. 1066) and 1912 (37 Stat. 527) to provide that patents for all tracts of land on Flathead Lake should be subject to easements for storage for irrigation or development of water power. A further amendment in 1919 (40 Stat. 1203) provided that the Secretary of the Interior designate surplus lands bordering on streams within the Flathead Reservation as "valuable for stock-watering purposes", and dispose of the lands under the terms of the 1904 Act.[11]

None of the Acts, or amendments thereto, in express terms grant riparian rights to the owners of the lake frontage property.[12] Nor do they contain any express reservation or exception with respect to these rights. The crucial question then is whether these acts, when viewed in the context of long established common law principles governing riparian rights, indicate that Congress intended the grants of riparian lands pursuant

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with the Flathead Indians. The bill in question proposes to survey and subdivide into small lots for summer-residence cites the entire unallotted lands fronting on Flathead Lake, the proceeds from the sale of these lots to be used in furthering the reclamation of the allotted Indians' lands which is now being carried on. The lands fronting on this lake are of little agricultural value, and it is believed that a large amount of money can be realized from the sale of the lake frontage; much more than can be realized under the present status of these lands, opening them to settlement. * * * Your committee is of the unanimous belief that the proposed legislation is most meritorious and for the benefit of the Flathead Indians." Sen. Rep. No. 17, 61st Cong. 2d Session.

[11] The allotment system and policy of settlement of unallotted lands was terminated by Congress in the Wheeler-Howard (Indian Reorganization) Act of June 18, 1934, 48 Stat. 984, under which the Tribes were organized.

[12] The express provisions in all of the Acts relating to water rights are concerned with the use of water for agriculture, mining, manufacturing or power purposes.

to the allotment acts to convey the rights of access and wharfage.

Applicability of Federal Common Law Rules with Respect to Riparian Wharfage Rights on Navigable Waters

The nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law. This is a consequence of the rules that (1) the United States holds title to the bed and banks of navigable waters in trust for future states; and (2) upon admission of a state to the Union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters. See Shively v. Bowlby, 152 U.S. 1, 48-49, 14 S.Ct. 548, 38 L.Ed. 331 (1894). The south half of Flathead Lake presents an exception. Title to the bed and banks of the south half of Flathead Lake below high water mark is held by the United States in trust for the Tribes. Thus, the basis for state determination of riparian rights is non-existent. State law, therefore, is not applicable.

The federal common law with respect to the riparian rights of access and wharfage is clear. Following a long line of earlier cases, the Supreme Court in United States v. River Rouge Improvement Co., 269 U.S. 411, 418, 46 S.Ct. 144, 146, 70 L.Ed. 339 (1926) stated:

> "It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, Shively v. Bowlby, 152 U.S. 1, 40 [14 S.Ct. 548, 38 L.Ed. 331], he (the riparian owner) has, in addition to the rights common to the public, *a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose.*" (Citations omitted), (emphasis added).

There are few decided cases involving the riparian rights of access and wharfage as they relate to federally held beds of navigable waters. Those cases which have considered the question, however, consistently recognize these riparian rights.

In Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U.S. 672, 683, 3 S.Ct. 445, 27 L.Ed. 1070 (1884) the Supreme Court, quoting from Yates v. Milwaukee, *supra* (77 U.S. 497, 10 Wall. 497, 19 L.Ed. 984 at 986), stated that among the rights to which a riparian owner on the navigable Potomac River is entitled are:

> " 'Access to the navigable part of the river from the front of his lot, the right to made a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be.' " [13]

This same rule was applied in the former Territory of Alaska. As was stated in Ketchikan Spruce Mills v. Alaska Concrete Prod. Co., 113 F.Supp. 700, 701-702 (D. Alaska 1953): "It is well established that a right of access * * * is a property right and may be exercised by constructing a wharf, pier or dock over the intervening tide lands to the navigable waters." [14]

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[13] See also Martin v. Standard Oil of New Jersey, 91 U.S.App. D.C. 84, 198 F.2d 523, 526 (1952); United States v. Groen, 72 F.Supp. 713, 720 (D.D.C. 1947); and United States v. Belt, 79 U.S.App.D.C. 87, 142 F.2d 761, 767 (1944).

[14] See also Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966, 970 (9 Cir. 1916); Dalton v. Hazelez, 182 F. 561, 573 (9 Cir. 1910); Decker v. Pacific Coast S.S. Co., 164 F. 974, 976 (9 Cir. 1908); and Columbia Canning Co. v. Hampton, 161 F. 60, 64 (1908).

Plaintiffs do not question the existence or propriety of these federal common law rules, but argue that they are not applicable because: (1) the Tribes, like states, have control over the beds and banks of navigable waters, and the "Tribes have not authorized the erection or maintenance of defendants' structures . . ."; (2) "The United States, acting in its supervisory capacity as trustee, has consistently recognized the Tribes' * * * right to assert full jurisdiction and control over wharfage rights along the lake;" (3) the lands involved are Indian trust lands which the Treaty of Hellgate reserved for the "exclusive use and benefit" of the Tribes; and (4) in allotting and authorizing the conveyance of tribal lands, Congress did not expresssly grant riparian rights and such a grant cannot be implied.

(1) Applicability of Tribal Law

Plaintiffs contend that tribal law and not federal law governs the use of the bed and banks of the south half of Flathead Lake. This contention is based in part upon a suggested analogy to the rule of Shively v. Bowlby, *supra*. According to *Shively*, prior to admission of a state into the Union, the beds and banks of navigable waters are held by the United States in trust for the future state. Upon admission, the new state receives full legal ownership of the beds and banks of its navigable waters. As a result, state law governs the questions of ownership, use and control of the bed, including wharfage rights. Plaintiffs argue that the Tribes stand in the same position as a state with respect to the ownership and control over the bed and banks of the south half of Flathead Lake.

The analogy, however, is faulty. While a state has legal title to the bed and banks of its navigable waters, the Tribes do not. Rather, title to the bed and banks of the south half of Flathead Lake is held by the

United States in trust for the Tribes. Congress has the power to grant title or rights in the bed and banks of the Lake as well as any other interests in Indian trust lands. Congress has no such power *vis-a-vis* the states. Moreover, barring Congressional action, the Tribes can never secure legal ownership as a state does. If analogies are to be drawn, therefore, the Tribes' position is more nearly that of a territory than of a state. Applying the principles of *Shively*,[15] *Potomac Steamboat Co.*, and *Ketchikan Spruce Mills*, the court concludes that federal law is applicable. As discussed *supra*, the federal courts have consistently recognized the riparian rights of access and wharfage with respect to federally held beds and banks of navigable waters.

Plaintiffs, in their reply brief of February 12, 1974 further buttress their argument that tribal law is controlling by quoting extensively from McClanahan v. Arizona State Tax Commission, *supra*. There the Court discussed at length the Indian sovereignty doctrine, reaffirming prior holdings that the Federal Government has largely permitted the Indians "to govern themselves, free from state interference", and that the Indian reservations were meant to establish "exclusive sovereignty" of the Indians "under general federal supervision". Plaintiffs recognize that *McClanahan* was concerned with the applicability of state law to a reservation and its Indian inhabitants, a question not here presented, but argue that the principles there enunciated are fully applicable.

The court cannot agree. In the complex, and sometimes uncertain, area of Indian law, care must be exercised in attempting to apply language used in one factual situation in a totally different context. *McClana-*

[15] Shively v. Bowlby recognizes the right of the United States to grant title or rights in the land below the high water mark of navigable waters prior to statehood.

han was concerned with the right of a state to impose a tax upon income earned by an Indian on a reservation. Here we are concerned with the rights of both individual Indians and their non-Indian grantees under grants by the Federal Government pursuant to Congressional action. There can be no doubt that the authority of the Federal Government is superior to that of the Tribe.[16] Congress was exercising that authority in enacting the Allotment Acts. We are concerned then with the intent of Congress with respect to riparian rights in providing for the allotment and sale of lands fronting on a navigable lake.

(z) Federal Recognition of Tribal Jurisdiction

[21, 22] In support of their contention that no riparian rights of the nature claimed by defendants were conveyed by the Federal Government, plaintiffs direct the court to two letters—one dated August 16, 1955 from the Acting Commissioner of Indian Affairs to Senator Mansfield, and the other dated February 18, 1959 from an Assistant Commissioner to the chairman of the Tribal Council.[17] Both letters concern the right of the Tribes

[16] Plaintiffs "agree the United States has a power paramount to that of the Tribes over tribal lands and waters and the United States, by clear Act of Congress, can exercise that power to the derogation of the tribal power". They contend, however, that "here the United States has not so acted, and, therefore, the power to regulate the use of tribal land and water resided unimpaired in the Tribes". (Plaintiffs' Supplemental Memorandum filed May 15, 1974).

[17] The first letter recites that under *Rochester* the title to the bed and banks of the south half of Flathead Lake below high water mark "is in the United States in trust for the Confederated Tribes," and that "It is therefore within the power of Confederated Tribes to lease these drawdown lands * * *". The second letter similarly states that title of the lands is in the United States in trust for the Indians and that "either leases or permits may be used in granting the use of tribal lands for dock sites or piers, across the flowage easement and into the permanent lake pool".

to grant leases or permits for the use of lands below high water mark on the south half of Flathead Lake. They indicate that the Tribes have complete authority to regulate the use of those lands. While it is true that interpretations of a law by the agency responsible for its enforcement are to be given deference, Udall v. Tallman, 380 U.S. 1, 18, 85 S.Ct. 792, 13 L. Ed.2d 616 (1965), the letters are not persuasive. Both letters were written almost a half century after the initial allotments and conveyances of the land.[18] Neither letter considers the federal common law principles with respect to access and wharfage. Nor does either letter deal expressly with the effect of prior allotments and conveyances of riparian lands pursuant to the Allotment Acts. More persuasive in determining Congressional intent is the legislative history of the Villa Sites Act (see note 10), as well as the bulletin issued by the Secretary of the Interior in connection with the sale of the Villa Sites, stating that Flathead Lake "is utilized for bathing, sailing, boating, and yachting, and several steam boats ply between the various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves." [19]

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[18] Moreover, it appears from affidavits of Namen and one of his predecessors in interest that at least since 1948 "the shore and banks thereof" have been used for "docks, wharf and pier purposes". An affidavit filed by Intervener, City of Polson, recites that a lumber mill was constructed in 1909 on allotted land "located about 100 yards from the West boundary line of the Morias allotment", and that "lands between the high water mark of and the bed of Flathead Lake were utilized for log storage, saw mill tramways, and lumber shipping docks".

[19] It is true, as plaintiffs state, that the circulars referred specifically to the Villa Sites, and we are here concerned with riparian rights of a portion of an allotment made prior to the Villa Sites Act. The patents issued pursuant to the Villa Sites Act, however, contain the same provisions as those under the 1904 Act. Neither made any express reference to riparian rights, and neither contained any reservation or exception with respect to those rights. As set forth in the two letters (note 17), patents issued under both acts were subject to flowage easements for storage of water for irrigation or development of water power, pursuant to the Acts of March 3, 1911 and August 24, 1912.

Plaintiffs also argue that the State of Montana has recognized the Tribes' right to control the bed of Flathead Lake, since on two occasions when the State built bridges crossing Flathead Lake and River it applied for rights-of-way to cross the Lake and River beds and paid damages therefor. Plaintiffs point out also that, although Congress gave the Secretary of the Interior the power to grant rights-of-way across Indian land, it also provided that such grants may not be made across lands of tribes organized under the Indian Reorganization Act "without the consent of the proper tribal officials". 25 U.S.C. §§ 324 and 325. We are not concerned, however, with rights of the State of Montana or with bridges or rights-of-way, but rather with rights acquired by Indians and their grantees through allotments prior to the Indian Reorganization Act of 1934, which terminated the allotment policy.

(3) Effect of Status of Indian Trust Land

Plaintiffs' next contend that the federal common law principles are inapplicable because the lands involved are Indian trust lands which have been reserved for the "exclusive use and benefit" of the Tribes. The mere fact that the lands are held in trust does not compel the conclusion that federal common law is not applicable. The beds of navigable waters within the former Territory of Alaska were, according to the rationale of *Shively, supra*, held by the United States in trust for the State of Alaska, (Dalton v. Hazelez, *supra*, 182 F. at 572) and the beds of navigable waters within the District of Columbia are likewise "vested in the United States for the benefit of the people". United States v. Groen, *supra* 72 F.Supp. at 719. Yet, as discussed *supra*,

the courts in both instances have recognized the private rights of wharfage and access in riparian proprietors. The fact that the lands were held in trust for Indians, therefore, is not in itself compelling, particularly in view of the power of Congress to grant titles which include these rights. The Federal Government in any event holds title, and it is federal law that applies.

It is true, as plaintiffs point out, that Article II of the Hellgate Treaty sets apart the Flathead Reservation for "the exclusive use and benefit" of the Tribes. As previously noted, however, the exclusivity of the Reservation has been sharply limited by the allotment of its lands to individual Indians, the provisions that allotted lands could be sold to non-Indians, and the massive settlement of surplus unallotted lands by non-Indians.[20] While the Flathead Reservation continues to exist, and the land within its original exterior boundaries is still Indian country, it would defy reality to hold that the entire Reservation presently exists for "the exclusive use and benefit" of the Tribes.

(4) Failure to Expressly Grant Riparian Rights

With respect to their final contention—that because riparian rights were not expressly granted by Congress they cannot be implied—plaintiffs raise two fundamental priciples of Indian law: (1) Only Congress has the power to abrogate Indian property rights (see Lone Wolf v. Hitchcock, 187 U.S. 553, 565-566, 23 S.Ct. 216, 47 L.Ed. 299 (1903)); and (2) status in derogation of Indian property rights, must be narrowly construed. See Menominee Tribe of Indians v. United States, *supra*.

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[20] As indicated in note 5, less than half of the Flathead Reservation is now trust land, and members of the Tribes comprise less than 20 per cent of the population living within the exterior boundaries of the Reservation.

The court of course recognizes these standards. There can be no question however, that by means of the General Allotment Act and the amendments thereto, the Congress expressed an intent to exercise its dominant power over Indian lands by dividing and conveying those lands, including lands riparian to Flathead Lake, in fee to Indians and non-Indians. Moreover, as discussed previously, the United States Government, decades before the allotment acts were passed, had taken the position that the riparian rights of access and wharfage were property rights, i.e. incidents of ownership of those holding land riparian to navigable waters.[21] In each case in which title to the bed and banks of navigable rivers is held by the Federal Government, the courts have held that riparian owners have the rights of access and wharfage. *Potomac Steamboat Co., supra; Ketchikan Spruce Mills, supra.*

Did Congress intend that the fee patents to allottees and purchasers of lakeshore property would include the riparian rights of access and wharfage? In that determination it is of course necessary to consider all of the treaties,[22] statutes and cases cited by the respective parties, as well as the undisputed facts. As the court said in Stevens v. C.I.R., 452 F.2d 741, 744 (9 Cir. 1971), "Federal policy toward particular Indian tribes is often manifested through a combination of general laws, specific acts, treaties, and executive orders. All must be considered in pari materia in ascertaining congressional intent. Kirkwood v. Arenas, 9th Cir. 1957, 243 F.2d 863, 867."

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[21] Dutton v. Strong, 66 U.S. 23, 31, 1 Black 23, 17 L.Ed. 29 (1861); Yates v. Milwaukee, 77 U.S. 497, 504 (10 Wall. 497), 19 L.Ed. 984 (1871).

[22] Although the court has rejected defendants' contention that riparian rights were implied in the Hellgate Treaty and Treaty of the Upper Missouri, there is nothing in either treaty which would preclude Congress from granting these rights to an Indian allottee and his assigns.

None of the parties have cited, nor has the court found, any case which has considered the precise question here presented, i.e. whether the owners of riparian property on navigable waters, acquired from the United States as trustee for an Indian tribe, have the riparian rights of access and wharfage. Defendants rely in part upon cases in which the courts have applied common law rules in other contexts in determining the rights of allottees and other grantees of Indian lands. In *Rochester, supra*, the court applied the "general rule" which "has its roots in the principle of the common law" in holding that "patents of the United States to lands bordering on navigable waters, in the absence of special circumstances, convey only to high water mark". 127 F.2d at 192.

In Oklahoma v. Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1922), the Court, dealing with lands once part of an Indian reservation, applied common law doctrine in holding that patents to lands riparian to non-navigable streams convey title to the middle of the stream. In Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8 Cir. 1970), the owner of a former Indian allotment sued to quiet title to land formed when the Missouri River receded from its meander line. The court affirmed the district court's application of "the general rule that land added by accretion to tracts which were riparian at the time of the official survey and plat is the property of the riparian owner". *Id.* at 147.

The court agrees with plaintiffs that these and other cases cited by defendants are not precisely in point since they deal with boundaries and accretion, questions usually determined by federal law even where riparian rights are determined by state law. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 523, 38 L.Ed.2d 526 (1973).[23] The cases are significant, however, in that

[23] *Bonelli* merely reiterates the general rule that the extent of a federal grant on a navigable stream is a federal question demanding the application of federal law, while the nature of the rights of riparian owners in the bed and banks of navigable streams is a state determination. That is because title to the bed and banks of navigable waters is vested in the states upon statehood. Prior to the admission of a state, title to the bed and banks of navigable streams was held in trust by the Federal Government and federal law was determinative of the rights of riparian owners. See, *Potomac Steamboat Co., supra.*

they stand for the propositions that: (1) federal common law is applied to determine the extent of federal grants of Indian land; (2) express Congressional language is not considered a prerequisite to the application of federal common law principles to federal grants of tribal lands; and (3) the fact that Indian land is involved does not necessitate the application of different principles in determining the extent of a federal grant.

Conclusion

Thus, an analysis of the relevant case law firmly establishes two principles:

(1) In all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent. This was established as early as 1861 in Dutton v. Strong, *supra*, and consistently followed in many subsequent cases.

(2) Where the United States holds title in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect.

Given these principles, this court cannot escape the conclusion that Congress must have intended that the fee patents issued pursuant to the Act of April 23, 1904

would include the customary riparian rights of access and wharfage. The fact that Congress did not expressly delineate these rights does not negate their existence. It was not necessary for Congress to specify every incident of ownership which accompanies a patent to lands on an Indian Reservation.

This conclusion is confirmed by the Senate Report on the Villa Sites Act in 1910 and the circular issued by the Department of the Interior.[24] Certainly, without the rights of access and wharfage, lands riparian to the south half of Flathead Lake would not have been considered as valuable as suggested in the report and circular.

It is significant also that for more than half a century the defendants and other riparian owners, with the full knowledge of the Federal Government and the Tribes[25] and without objection from either, expended large sums of money for docks and wharves abutting their lands on the south half of Flathead Lake. Many persons built and maintain homes and business enterprises. Wharves and piers were constructed, boats and ships plied their way through the area, and commerce was carried on.

Now, after more than fifty years of such activity on the Lake, plaintiffs claim that the riparian owners who have constructed piers and wharves beyond the high

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[24] The court agrees with plaintiffs that it is the intent of Congress rather than the Department of the Interior which is controlling, but it has long been recognized that the Secretary of the Interior is the executive arm of the Government to execute the declared Congressional policy with the Indians.

[25] It is of course clear that there is no statute of limitations, and the doctrine of laches is not applicable. The long recognition of the riparian rights of the defendants and others does suggest, however, that the Department of the Interior assumed a Congressional intent that the patents include riparian rights.

water mark are trespassers, should be enjoined from further trespass, and be requested to move immediately all buildings and structures beyond the high water mark.[26] To grant this relief in the light of the factual and legal considerations set forth above, would be a grievous injustice to the defendants and others in a similar position.

The court, therefore, concludes that the defendants as owners of lands riparian to the south half of Flathead Lake are entitled as a matter of law to access to the lake. Concomitant with that right of access is the right to wharf out to navigable water. Plaintiffs' motion for summary judgment is therefore denied. Defendants' motion for summary judgment is granted insofar as the existence of the riparian rights of access and wharfage are concerned.[27]

There remains for determination the question of whether any of the structures owned and maintained by the defendants constitute an abuse of their riparian rights. Plaintiffs contend that "at least some of the structures, including a building and a land-fill extending into the Lake, are not of the type permitted and exceed the limits normally held proper for riparian owners". This question cannot be resolved on the basis of the undisputed facts. As to this issue a further hearing will be required.

Defendants will prepare, serve and file a draft of partial summary judgment in conformance with this order.

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[26] Apparently defendants first received official notice of a claim of trespass in May, 1973. There may have been prior informal notice. The letters written by the Commissioner of Indian Affairs, upon which plaintiffs rely, were dated in 1955 and 1959, but as noted *supra*, neither letter expressly considered the question of riparian rights. In any event, there is nothing in the record to suggest any action by the Government or the Tribes prior to May, 1973.

[27] In view of this conclusion, it is unnecessary for the purpose of this order to consider the contention of the respective parties with respect to a temporary injunction or the sufficiency of plaintiffs' answer to some of defendants' interrogatories.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Civil No. 2343

[Filed, Entered and Noted Nov. 1, 1974. John E. Pederson, Clerk. By Dawna L. Nierstheimer, Deputy Clerk]

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,
Plaintiffs,

v.

JAMES M. NAMEN, et al.,
Defendants.

PARTIAL SUMMARY JUDGMENT

This cause came on to be heard on plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and upon motions to dismiss filed by defendants and intervenor, considered as motions for summary judgment, pursuant to Rules 12 (b) and 56 of the Federal Rules of Civil Procedure; and

The Court having considered the admitted facts, affidavits, and various exhibits stipulated into evidence; having heard oral argument; having found that there is no genuine issue as to any material fact with regard to the primary legal issue in this case of whether the defendants, as owners of property riparian to the south half of Flathead Lake, have the riparian rights of access and wharfage, but that, as to a secondary issue of whether any of the structures owned and maintained by the

defendants constitute an abuse of their riparian rights, further hearing and further development of facts are required; having concluded that defendants and intervenor are entitled to judgment as a matter of law on the primary issue; having entered a partial summary judgment to that effect on September 16, 1974; having thereby precluded plaintiffs from obtaining an injunction against construction of wharves, docks, or other obstructions below the highwater mark of Flathead Lake solely on the ground that the lakebed below that point is held by the United States in trust for the exclusive beneficial use of the plaintiff Tribes; and plaintiffs having indicated that they will seek an immediate appeal of the denial of their motion for summary judgment on the merits and the consequent denial of an injunction;

It is hereby ORDERED:

(1) That the Court's order of partial summary judgment entered September 16, 1974, is hereby vacated, and this order of partial summary judgment is hereby entered in lieu thereof;

(2) That the plaintiffs' motion for summary judgment is denied, and that summary judgment is entered in favor of the defendants and intervenor;

(3) That owners of lands riparian to the south half of Flathead Lake are entitled as a matter of law to access to the lake, with concomitant rights to wharf and/or dock out to navigable water;

(4) That, based on defendants' and intervenor's prevailing on this primary issue, injunctive relief in favor of plaintiffs is hereby denied; and

(5) That further proceedings which may be necessary before this Court on the secondary issue, abuse of riparian rights, are hereby stayed pending perfection of an appeal by plaintiffs and a decision on any such appeal.

DATED this 1st day of November, 1974.

/s/ William J. Jameson
WILLIAM J. JAMESON

United States District Judge

APPENDIX D

Treaty Hell Gate, July 16, 1855, 12 Stat. 975

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a treaty was made and concluded at the treaty ground, at Hell Gate, in the Bitter Root Valley, on the sixteenth day of July, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the hereinafter named chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes and duly authorized thereto, by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead

nation, with Victor the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognise Victor as said head chief.

ARTICLE I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°,) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head waters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the

Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west of Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as

fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. *And provided*, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner—that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President in providing for their removal to the reservation, breaking up and fencing farms, building houses

for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the

accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the

sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to guaranty the exclusive use of the reservation provided for

in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in River by the servants of that company.

ARTICLE XI. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, Governor and Superintendent Indian Affairs W.T. [L.S.]

VICTOR, Head Chief of the Flathead Nation,
his x mark. [L.S.]

ALEXANDER, Chief of the Upper Pend d'Oreilles,
his x mark. [L.S.]

MICHELLE, Chief of the Kootenays,
his x mark. [L.S.]

AMBROSE, his x mark. [L.S.]
PAH-SOH, his x mark. [L.S.]
BEAR TRACK, his x mark. [L.S.]
ADOLPHE his x mark. [L.S.]
THUNDER, his x mark. [L.S.]
BIG CANOE, his x mark. [L.S.]
KOOTEL CHAH, his x mark. [L.S.]
PAUL, his x mark. [L.S.]
ANDREW, his x mark. [L.S.]
MICHELLE, his x mark. [L.S.]
BATTISTE, his x mark. [L.S.]

Kootenays

GUN FLINT, his x mark. [L.S.]
LITTLE MICHELLE, his x mark. [L.S.]
PAUL SEE, his x mark. [L.S.]
MOSES, his x mark. [L.S.]

James Dotty, Secretary.
R. H. Lansdale, Indian Agent
W. H. Tappan, Sub Indian Agent.
Henry R. Crosire,
Gustavus Sohon, Flathead Interpreter.
A. J. Hoecken, Sp. Mis.
William Craig.

And, whereas, the said treaty having been submitted to the Senate of the United States for their constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"In Execution Session,
"Senate of the United States, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the rati-

fication of treaty between the United States and Chiefs, Headmen and Delegates of the confederate tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, who are constituted a nation under the name of the Flathead Nation, signed 16th day of July, 1855.

"Attest: "ASBURY DICKENS, Secretary."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand and eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of
[Seal.] the Independence of the United States, the eighty-third.

JAMES BUCHANAN.

By the President:

LEWIS CASS, Secretary of State.

APPENDIX E

General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided,

the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he

shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And, provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United

States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That its patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same

shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the

Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

APPENDIX F

Act of April 23, 1904, 33 Stat. 302

CHAP. 1495.—An Act For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to

inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants

as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner

in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12. That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, and said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make

application therefor within one year after the passage of this Act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights

on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine thereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school and mission purposes, as provided in sections eight and twelve of this Act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this Act.

SEC. 16. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received. Approved, April 23, 1904.